

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-6142

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE HARTFORD PROVISION COMPANY,

Plaintiff-Appellee

v.

UNITED STATES OF AMERICA,

Defendant-Appellant

ON APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

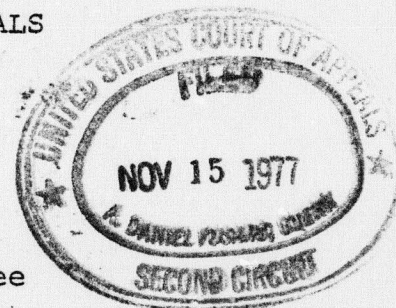
BRIEF FOR THE APPELLANT

M. CARR FERGUSON,
Assistant Attorney General,

GILBERT E. ANDREWS,
CROMBIE J. D. GARRETT,
AARON ROSENFELD,
Attorneys,
Tax Division,
Department of Justice,
Washington, D. C. 20530.

Of Counsel:

RICHARD BLUMENTHAL,
United States Attorney.



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No. 77-6142

THE HARTFORD PROVISION COMPANY,
Plaintiff-Appellee

v.

UNITED STATES OF AMERICA,
Defendant-Appellant

ON APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLANT

STATEMENT OF THE ISSUE PRESENTED

Whether the District Court erred in holding that the Hartford Provision Company had attained the status of a judgment lien creditor within the purview of Section 6323(a) of the Internal Revenue Code prior to the filing of a federal tax lien, and thereby obtained priority over the tax lien.

STATEMENT OF THE CASE

This action was instituted by the Hartford Provision Company (Provision) in the District Court for the District of Connecticut, to recover \$6,066 alleged to have been wrongfully levied upon by the Internal Revenue Service. (R. 5,13.)^{1/} Subsequent to an answer by the United States, both parties filed cross-motions for summary judgment. The facts necessary for decision have been stipulated by the parties. (R. 3-12.) The memorandum of decision of the District Court (Judge Newman) (R. 13-17), which is not reported, was filed on July 5, 1977. On this same date, the District Court entered its judgment in favor of Hartford in the amount of \$6,066, with interest. (R. 2, 18.) On August 19, 1977, the United States timely filed its notice of appeal to this Court. (R. 2.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

The material facts may be stated as follows:

On December 12, 1974, Provision obtained an order from a state court in Connecticut^{2/} permitting Provision to garnish the goods, effects and estate of Thomas H. Hall Associates, Inc. (Hall) held by the Community Renewal Team of Greater Hartford, Inc. (CRT). The writ of garnishment was served on CRT on December 17, 1974. On that date, CRT was indebted to Hall in the amount of \$6,066. (R. 3, 13.)

^{1/} "R." references are to the separately bound record appendix.

^{2/} In the District Court's memorandum of decision, the date Provision obtained the court order is reported as December 12, "1975", not 1974. (R. 13.) We believe this merely to be a typographical error, and that the correct year is 1974, as stipulated by the parties. (R. 3.)

On January 31, 1975, Provision obtained a judgment against Hall in the Superior Court of the State of Connecticut in the amount of \$15,705.02, plus costs of \$143.40. Also on January 31, 1975, CRT established an account with the Connecticut Bank and Trust Company designated as the "CRT-Thomas Hall Associates Creditors Account." CRT deposited \$6,066 into this account. This deposit represented the amount CRT was indebted to Hall. (R. 3-4, 13-14.)

On February 24, 1975, the Internal Revenue Service made an assessment against Hall in the amount of \$6,889.21, representing unremitted withholding and social security taxes of Hall for the third quarter of 1974. On March 6, 1975, a notice of federal tax lien was filed with the Secretary of the State of Connecticut, and with the Town Clerk, Bloomfield, Connecticut. (R. 4, 14.)

Meanwhile, on March 4 and March 7, 1975, Provision unsuccessfully sought to serve on CRT a writ of execution issued by the Superior Court on February 19, 1975, in order to have the funds owed by CRT to Hall paid over to Provision in partial satisfaction of the judgment Provision had obtained against Hall. Actual service of the writ of execution was not made until March 25, 1975. On March 7, 1975, however, the Internal Revenue Service served a notice of levy on the Connecticut Bank and Trust Company, seeking to have the funds held in the "CRT-Thomas Hall Associates Creditors Account" paid over to the Internal Revenue Service in partial satisfaction of the tax assessment against Hall.

In response to the notice of levy, the Connecticut Bank and Trust Company paid over to the Internal Revenue Service \$6,066, by check dated March 13, 1975. (R. 4-5, 14.)

On June 13, 1975, Provision requested the Internal Revenue Service to pay over to Provision those funds paid to the Internal Revenue Service by the Connecticut Bank and Trust Company out of the "CRT-Thomas Hall Associates Creditors Account," since Provision allegedly had a superior claim to the funds. The Internal Revenue Service refused this request, and the instant action was timely instituted by Provision on March 22, 1976. (R. 5, 14-15.)

In granting Provision's motion for summary judgment (and in denying the Government's cross-motion), the District Court correctly noted that Section 6323(a) of the Internal Revenue Code provides that a creditor, who has attained the status of a judgment lien creditor prior to the filing of the notice of federal tax lien, shall have priority over that lien. Furthermore, the court apparently agreed with the Government's assertions that only choate and perfected state-created liens can have such priority over a federal tax lien. The court, however, incorrectly decided that Provision had obtained the status of a judgment lien creditor prior to the time the federal tax lien was filed. In so ruling, the court rejected the argument of the Government that, under Connecticut law, an attachment lien such as the one in the case at bar is not perfected until a writ of execution is successfully

served. Furthermore, the court apparently rejected the Government's argument that until all state requirements for the perfection and enforcement of a lien have been successfully met, the lien is unperfected for the purpose of deciding priority against a federal tax lien.

From the judgment in favor of Provision, the United States brings this appeal.

SUMMARY OF ARGUMENT

On March 6, 1975, both the Government and Provision held liens upon the property of Hall in CRT's possession. This case then involves the issue of lien priority. The District Court decided the case in favor of Provision.

The District Court correctly recognized that priority must be determined by a federal standard, but the Court utilized an incomplete standard. The District Court held that before a state-created lien (in this case, a judgment lien) can prime a perfected federal tax lien, the state lien must be choate--that is, the identity of the lienor, the amount of the lien and the property subject to the lien must be established prior to the filing by the Government. As far as this rule goes, it is unquestionably correct, and we do not dispute that Provision's lien satisfies the three above-mentioned criteria. But there is a fourth condition which also must be satisfied by a state-created lien, which the District Court did not take into account.

This fourth criteria is that the state lien must be absolutely perfected under the applicable state law. Another way of stating this condition is that if there are any steps necessary for perfection which have not been successfully accomplished prior to the filing of the notice of tax lien, or if the state courts themselves describe the state lien as unperfected, then the state lien must be considered as unperfected under state law, and, consequently, subordinate to the federal tax lien.

This fourth condition, the "state perfection" condition, has been recognized and applied by the Supreme Court, this Court and other federal and state courts. In the case at bar, although Provision most certainly was a judgment creditor, we contend that it was not a fully perfected judgment lien creditor, for it failed to successfully serve a writ of execution upon CRT (as required by state law) prior to the time the Government filed its notice of tax lien.

What we are arguing in this case, is that the federal standard of perfection necessary for a state-created lien to prime a filed tax lien includes the condition of perfection under state law, and, in addition, we submit that Provision's lien did not satisfy this condition. The law of Connecticut is clear that a writ of execution must be successfully served, or the attachment lien held by the judgment creditor is unperfected. Since Provision failed

to accomplish this service prior to the filing by the Government, Provision necessarily held an unperfected state lien. An unperfected state lien cannot prime a filed federal tax lien. Since the District Court erred in not considering the fact that Provision held an unperfected lien, the decision of the court should be reversed, and judgment should be entered for the Government.

ARGUMENT

AN UNPERFECTED STATE-CREATED LIEN DOES NOT HAVE PRIORITY OVER A PROPERLY FILED FEDERAL TAX LIEN

A. Introduction

It is the Government's contention that a state-created lien such as Provision's lien in the instant case, can only have priority over a properly filed federal tax lien if the lien holder has satisfied four conditions prior to the time the federal tax lien is filed. The four conditions are that: (1) the identity of the lienor is known; (2) the property subject to the lien is established; (3) the amount of the lien has been determined; and (4) all steps required under state law for perfection of the lien have been accomplished. The District Court focused its view primarily on the first three conditions, and held that Provision's lien satisfied them. We do not dispute this finding. Rather, we submit that the fourth condition listed above was not adequately given recognition by the lower court, and this omission resulted in judgment for Provision.

In the lower court, the Government argued that by failing successfully to serve a writ of execution on CRT prior to the Government's filing its notice of federal tax lien, Provision had not taken all steps required by Connecticut law to have a perfected lien, and thus, Provision's lien was subordinate to the tax lien. The District Court indirectly addressed this argument by stating, in effect, that Provision's failure timely to serve a writ of execution does not illumine the issue of whether Provision's lien satisfied the first three conditions listed above.

It is respectfully submitted that there are two questions to be answered by the Court: first, what is the federal standard which a state lien must satisfy to have priority over a filed federal tax lien, and second, did Provision's lien satisfy that standard. We will discuss the first issue in Subpart B, infra, and the second in Subpart C, infra.

B. The District Court erred in failing to consider the fact that Provision did not comply with all state requirements for perfection of its lien

The federal tax lien in the case at bar is a creature of federal law, created by operation of Section 6321 of the Internal Revenue Code of 1954, Appendix, infra. Section 6321 provides that if any person liable to pay any tax neglects or refuses to pay the same after demand the amount thereof shall be a lien in

favor of the United States upon all property and rights to property belonging to such person. Upon assessment of the tax, the tax lien arose, and encumbered all property belonging to Hall. Sec. 6322(a), Appendix, infra; United States v. New Britain, 347 U.S. 81 (1954). Therefore, on February 24, 1975, the Government's tax lien upon all of the property of Hall arose, including, of course, the debt which CRT owned to Hall, and was fully perfected by filing on March 6, 1975.

When there are competing claims to a delinquent taxpayer's property between a federal tax lien and an interest created or recognized by state law, the courts have adopted the principle that "the first in time is the first in right" to determine priority. United States v. New Britain, 347 U.S. 81, 85-86, supra.^{3/} But an exception^{4/} to the federal "first in time" rule of priority is provided by Section 6323(a), Appendix, infra, for a purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor,^{5/} against whom a federal tax lien "shall not be valid" until notice of the lien is filed.

^{3/} The issue of whether any state-created lien, including the lien of a judgment creditor, has priority over the federal tax lien is a question of federal law. United States v. Security Trust & Savings Bank, 340 U.S. 47, 49 (1950).

^{4/} For other exceptions not applicable to the case at bar, see Section 6323(b) and (c) (26 U.S.C.).

^{5/} Provision, in the instant case, is claiming priority based upon the assertion that it was a judgment lien creditor, within the purview of Section 6323(a), prior to the time the notice of tax lien was filed by the Government.

The purpose of the federal tax lien statute is to insure prompt and certain collection of taxes due the United States from tax delinquents, and this purpose cannot be carried out if any state-created lien could deplete the assets of a taxpayer prior to the time the Government can institute collection activities. A state cannot affect the standing of federal liens simply by causing any state-created lien to attach at some early, arbitrary point in time (prior to the time the notice of tax lien is filed) and thereby prime the federal tax lien. United States v. New Britain, 347 U.S., p. 86. Therefore, to prevail over a federal tax lien as "first in time," or under Section 6323(a), the interest competing with the tax lien must be perfected before the filing of notice of the tax lien. Consequently, various courts have sought to enunciate standards which state-created liens must satisfy prior to the filing of the notice of federal tax liens in order to have priority over such liens. Commonplace expressions in this area are that an "inchoate"^{6/} state lien does not prime a filed federal tax lien, and that the state lien must be "specific and perfected" to have priority over a filed tax lien.^{7/}

^{6/} The definition of what constitutes a "choate" state lien can be found in United States v. New Britain, 347 U.S. 81, 84, supra, where the Court stated that one has a choate lien when the identity of the lienor, the property subject to the lien, and the amount of the lien are established.

^{7/} The requirements of "specific and perfected" have been referred to as the two wicked sisters (9 Mertens, Law of Federal Income Taxation (Rev.), § 54.43, p. 126), and have been recognized by various federal courts. See, e.g., Illinois v. Campbell, 329 U.S. 362, 371, 372 (1946); New York v. Maclay, 288 U.S. 290, 292 (1932); United States v. Trigg, 465 F. 2d 1269 (C.A. 8, 1972), cert. denied, 410 U.S. 909 (1972).

Most of the ambiguities which have existed as to the requirements necessary to permit a state-created lien to prime a properly filed federal tax lien,^{8/} have been largely resolved by a trio of Supreme Court decisions. A reading of United States v. Security Trust & Savings Bank, 340 U.S. 47 (1950), United States v. New Britain, 347 U.S. 81 (1954) and United States v. Vermont, 377 U.S. 351 (1964) in general discloses the ingredients of prior perfected state liens.

In the Security Trust & Savings Bank case, the question presented was whether a tax lien of the United States was prior in right to an attachment lien arising under state law where the federal tax lien was recorded subsequent to the date of attachment, but prior to the date the attaching creditor obtained judgment. The Supreme Court noted that under the law of California, the attachment by the creditor created a lien on the debtor's property. But the Court further noted that an "inchoate" lien could not prime a tax lien. To determine if the state-created lien in question was so far perfected as to defeat a federal tax lien, the Court looked no further than state law. The Supreme Court stated that "a state court's classification of a lien as specific and perfected is entitled to weight, [but] it is subject to reexamination by this Court. On the other hand, if the state court itself describes the lien as inchoate, this

^{8/} For purposes of simplicity and clarity, state-created liens which can prime a filed federal tax lien will be referred to as fully perfected liens.

classification is 'practically conclusive.' Illinois v. Campbell, 329 U. S. 362, 371." United States v. Security Trust & Savings Bank, 340 U.S., pp. 49-50, supra. Since the Supreme Court of California had held that an attachment lien was only a contingent lien, and would not become perfected until a judgment was rendered, the Supreme Court of the United States held that it could not prime a federal tax lien.^{9/} Thus, although the question of priority was definitely a federal question, state requirements as to perfection are very much relevant. It is, accordingly, true that a state lien which is "contingent upon taking subsequent steps for enforcing it" does not have priority over the tax lien. Cf. United States v. Security Trust & Savings Bank, 340 U.S. p. 51, supra.

The second case in the trilogy is United States v. New Britain, 347 U.S. 81 (1954). The question there involved the relative priority of federal and municipal liens to the proceeds of a mortgage foreclosure sale of the property to which the liens attached. Under the Connecticut law such liens were described as specific and perfected. The Supreme Court, however, reasoned a step beyond its rationale in Security Trust & Savings Bank to determine if the state liens were superior to the federal tax liens. The Supreme Court looked beyond state law and turned to

^{9/} The Court further noted that the doctrine of relation back--that is, merging the attachment lien into the later judgment and relating the judgment lien back to the date of attachment--cannot operate to prime the tax lien. United States v. Security Trust & Savings Bank, 340 U.S., p. 50, supra.

the three-pronged test of choateness so familiar to this area-- that is, the Court examined the state liens to see if the identity of the lienor, the amount of the lien and the property subject to the lien had been established. The Court remanded the case to have determined the order of priority of the various liens, in accordance with its opinion.

The capstone decision to this trilogy is United States v. Vermont, 377 U.S. 351 (1964).^{10/} This case involved a conflict between two liens upon the property of a solvent Vermont taxpayer--a federal tax lien and an antecedent state tax lien based on a Vermont statute worded in terms virtually identical to the provisions of the federal lien statutes. The District Court concluded that for a state lien to prime a federal tax lien, it "must be unquestionably complete." By this, the court meant that all steps must be taken that will insure that the lien will not be lost." United States v. Cutting & Trimming, Inc., 206 F. Supp., p. 954, supra.

The Supreme Court, in examining the Vermont lien, noted that the lien was in every way as perfected as the federal lien. The State of Vermont had complied with all state law requirements for the creation and perfection of the lien, and, in addition, the lien satisfied the three tests of choateness set forth in New Britain. Thus, the state's lien was specific and perfected, and able to take priority over the federal tax lien.

^{10/} In the District Court, this case was captioned United States v. Cutting & Trimming, Inc., 206 F. Supp. 951 (Vermont, 1962). It was affirmed, sub nom. United States v. Vermont, 317 F. 2d 446 (C.A. 2, 1963), aff'd 377 U.S. 351 (1964).

It is believed that these three Supreme Court cases establish the standards for deciding when a state-created lien is sufficiently perfected to prime a federal tax lien. The first condition, as noted by all three decisions, is that the state-created lien must be unquestionably perfected under state law.^{11/} If all of the requirements for perfection under state law have not been undertaken, or if the lien, in its condition at the time the tax lien is filed, would be described as inchoate or unperfected by the state courts, then that state-created lien cannot prime a federal tax lien. Once the lien clears this first hurdle, it must be judged and measured against the three federal tests of choateness. Only in this manner can the dictates of the Supreme Court be carried out--that is, the question of priority is a federal question, with the completeness of a state-created lien measured against by both state and federal standards.

The Government's position that a judgment lien must be perfected under state law, and comply with federal requirements for "perfection" has the support of the Treasury Regulations.^{12/}

^{11/} The Supreme Court has gone so far as to say that if the state court itself characterizes the lien as inchoate, the Supreme Court need not make another independent decision as to this characterization. Illinois v. Campbell, 329 U.S. 362, 371, (1946). Furthermore, a court may decide that a "lien" is only a caveat of a more perfect lien to come by using a state or federal standard. Illinois v. Campbell, 329 U.S., p. 376, supra.

^{12/} In the District Court, both parties argued that Treasury Regulations on Procedure and Administration (1954 Code), Section 301.6323-1(a)(2)(i)(b) (26 C.F.R.) supported their respective positions. This Regulation read, in pertinent part:

The term "judgment creditor" means a person who has obtained a valid judgment in a court of record and of competent jurisdiction for the

Although the term "judgment lien creditor" is not defined by statute, it is defined in Treasury Regulations on Procedure and Administration (1954 Code), Section 301.6323(h)-1(g), Appendix, 12/ (continued):

recovery of specifically designated property or for a certain sum of money and, in the case of a judgment for the recovery of a certain sum of money, who has a perfected lien under such judgment on the property involved. The term "judgment" does not include an inchoate lien, such as an attachment lien, unless and until such lien has ripened into a judgment. United States v. Security Trust and Savings Bank (1950) 340 U.S. 47 * * *.

This regulation, though, was not effective at the time the issue herein was brought before the court. See T.D. 7429, 1976-2 Cum. Bull. 396. The regulation that was, and is, effective is cited in the body of our brief. (All regulations are retroactive unless the Commissioner prescribes the extent to which they shall be applied without retroactive effect. Section 7805(b); cf. Chock Full O'Nuts Corp. v. United States, 453 F. 2d 300, 302-303 (C.A. 2, 1971)). The regulation relied upon by both parties below defined the term "judgment creditor." The term "judgment creditor" was a phrase used in Section 6323 prior to that section's amendment by the Federal Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1125. The phrase now reads "judgment lien creditor." The insertion of "lien" in the phrase "judgment creditor" merely codified how that phrase had been defined by various courts. H. Rep. No. 1884, 89th Cong., 2d Sess., p. 36 (1966-2 Cum. Bull. 815, 840); see Fore v. United States, 339 F. 2d 70 (C.A. 5, 1964). The change in language from Section 301.6323-1(a)(2)(i)(b) to Section 301.6323(h)-1(g) does not amount to change in substance. Under both definitions, a judgment lien must be perfected under state law to attain that status necessary to prime a filed federal tax lien. And to the extent the change in terminology does reflect a change in substance, it can only support the Government's position. The regulation as it now reads is more explicit as to those standards to which a state lien must comply. Prior to the change in language, these standards were implicit in the phrase "a perfected lien under such judgment."

infra. This regulation provides that to be perfected (in a federal sense), the judgment lien must establish the identity of the lienor, the property subject to the lien and the amount of the lien.^{13/} In addition, the regulation requires absolute perfection under local law. The regulation states:

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*

*

If recording or docketing is necessary under local law before a judgment becomes effective against third parties acquiring liens on real property, a judgment lien under such local law is not perfected with respect to real property until the time of such recordation or docketing. If under local law levy or seizure is necessary before a judgment lien becomes effective against third parties acquiring liens on personal property, then a judgment lien under such local law is not perfected until levy or seizure of the personal property involved. * * *

As we will show, a precondition under Connecticut law to the perfection of Provision's lien was the successful service of a writ of execution within 60 days of final judgment. This service was not accomplished prior to the filing of the notice of tax lien. Provision had simply not undertaken all steps to insure that its lien would not be lost (United States v. Cutting & Trimming, Inc., 206 F. Supp., p. 954, supra.) Therefore Provision's lien was unperfected in a state sense, and necessarily unperfected

^{13/} We have previously identified these requirements as those set forth in United States v. New Britain, 347 U.S. 81, supra, generally referred to as the three tests of choateness.

in a federal sense. This conclusion must follow from a reading of the leading Supreme Court cases and the above-cited Treasury Regulations.^{14/}

A state-created lien can only be considered sufficiently perfected to prime a federal tax lien if that lien meets, in effect, two standards. The lien must first be fully perfected under state law,^{15/} and, if it meets this burden, it then must be choate under federal law. The District Court in the instant case was apparently under the erroneous impression that since priority is a federal question, all state law considerations as

^{14/} The Treasury Regulations herein represent an effort by the Commissioner to supply a definition that Congress omitted. It is well settled that such a regulation must be sustained unless it is unreasonable and plainly inconsistent with the statute, and it should not be overruled except for weighty reasons. Bingler v. Johnson, 394 U.S. 741, 749-751 (1969) (and cases cited therein); Poirier & McLane Corp. v. Commissioner, 547 F. 2d 161, 167 (C.A. 2, 1976); B. Forman Co. v. Commissioner, 453 F. 2d 1144, 1152 (C.A. 2, 1972), cert. denied, 407 U.S. 934 (1972), rehearing denied, 409 U.S. 899 (1972). It is respectfully submitted that the regulation is reasonable and necessary to carry out the Congressional intent that only fully perfected state liens take priority over the filed federal tax lien.

^{15/} A state lien is perfected under state law only if two conditions exist concurrently: (1) the state courts do not label the lien as unperfected, or inchoate, or incomplete, and (2) all state law requirements for total perfection and enforcement have been satisfied. Cf. United States v. Security Trust & Savings Bank, 340 U.S., p. 51 *supra*; United States v. Bond, 279 F. 2d 837, 843 (C.A. 4, 1960). If this latter condition has not been accomplished, then the state lien is really nothing more than "a caveat of a more perfect lien to come," and cannot prime a filed federal tax lien. Cf. New York v. Maclay, 288 U.S. 290, 294 (1932). Thus, a state lien which protects the lienor against others, will not be good against the Government if the lien is still contingent upon taking such future steps as giving public notice or enforcing it. Illinois v. Campbell, 329 U.S. p. 374, *supra*.

to perfection were irrelevant. But as we have noted above, state law considerations are most crucial, for if a state-created lien is not perfected under state law, it certainly cannot prime a federal tax lien.

On March 6, 1975, the federal tax lien was both in existence and filed. (R. 4, 14.) Prior to this time, Provision had served a writ of attachment on CRT (a debtor of Hall) and obtained judgment against Hall. But it was not until after the tax lien was filed that Provision executed on its lien pursuant to Conn. Gen. Stat. Ann. § 52-328, Appendix, infra. It is our position that the failure to successfully serve a writ of execution pursuant to Section 52-328 prevented Provision from attaining the preferred status of a judgment lien creditor under Section 6323(a) of the Internal Revenue Code.

The instant issue, involving Connecticut law, has never been decided, but there are decisions, involving similar state laws, which do support the Government's position. Thus, in Corwin

16/ It is easy to understand how a court can lose sight of the fact that state law aspects in regard to perfection are material. If the lien in question obviously does not meet the federal standard of choateness, no decision need be reached as to whether or not the lien was perfected under state law. See, United States v. Pay-O-Matic Corp., 162 F. Supp. 154, 155 (S.D. N.Y., 1958) aff'd per curiam sub nom. United States v. Goldstein, 256 F. 2d 581 (C.A. 2, 1958), cert. denied 358 U.S. 830 (1958), rehearing denied 359 U.S. 985 (1959). But if the lien does comport with the federal standard of choateness, the analysis of the court must continue to determine if all requirements under state law have been met. Thus, the dual requirement of "specific and perfected" discussed above can be interpreted to mean choate (in a federal sense) and perfected (in a state sense).

Consult, Inc. v. Interpublic Group of Cos., Inc., 512 F. 2d 605 (C.A. 2, 1975), this Court was faced with a lien priority question between judgment creditors and the Government. Although the case was decided on another basis,^{17/} the facts of the case, and this Court's statement as to the controlling law, are pertinent here. In Corwin Consult, Inc., a creditor of the taxpayer received judgment against the taxpayer in May, 1972. On October 3, 1972, at 10:32 a.m., the Government filed its notice of tax lien. At 12:51 that afternoon, the creditor perfected its judgment lien by delivering an execution to the Sheriff of New York. This Court noted (p. 607, fn. 2) that, under New York law, a judgment creditor does not become a judgment lien creditor until execution is delivered to the sheriff. This Court then stated (p. 608), albeit in dicta, that if "the IRS notices were properly filed on October 3, 1972, the United States would be entitled to priority, as the court below held, because the filing preceded [the creditor's] perfection of judgment." This case,

^{17/} The actual issue on appeal was whether summary judgment was properly granted in the court below, where the legal residence of the taxpayer was in dispute. The residence of the taxpayer was material to that case, since the legal residence of the taxpayer determines where the Government's tax lien must be filed. In the present case, no one disputes that the tax liens were properly filed, pursuant to Section 6323(f) of the Internal Revenue Code.

although it was not applying Connecticut law, should serve as a guideline in the instant appeal, if, as we will show in Subpart C, Connecticut law also requires the successful service of a writ of execution for perfection. The facts parallel those of the instant case. In both cases, the creditors received judgment prior to the filing by the Government's notice of lien, but in neither case were the liens perfected under state law. Therefore, neither lien is sufficiently perfected to merit priority.

A leading case in this area is Miller v. Bank of America, N. T. & S. A., 166 F. 2d 415 (C.A. 9, 1948). In Miller, a creditor (Miller) served a writ of attachment upon the Bank of America on January 5, 1944. On March 11, 1944, Miller obtained a judgment in his favor, and filed his judgment. Later, in April, 1944, the federal tax liens were filed. The Court was faced with a question of priority between the lien of the Government and that of Miller, who claimed to be a judgment creditor pursuant to Section 3672(a) (the predecessor of Section 6323(a)). After discussing issues not directly relevant to this case, the Court concluded (p. 417) that a "judgment, in and of itself, does not necessarily constitute a lien upon any property unless made so by statute." The Court then looked to California law (the state in which the case arose) and stated that (p. 418): "California follows the general rule that goods and chattels of a judgment debtor are subject to liens based upon an execution and not upon the rendition or entry of judgment." The Court

then looked to the language of the Supreme Court of California to see if a judgment creditor, absent execution, had a lien on personal property. The Court held that it did not. The Ninth Circuit held that in order for a judgment creditor to have a lien on personal property under a judgment, it is necessary that a writ of execution be issued under the judgment. Since there was no execution in Miller, the Government had the paramount and superior lien.

The requirements of Connecticut law, as will be discussed in Subpart C, are similar to the laws existing in California when Miller was decided.^{18/} In both states, to have a perfected lien on the attached property, a writ of execution must issue. Since this was not accomplished in either case, prior to the filing of the tax lien, the tax lien is paramount.

The rule we believe to be appropriate under the Connecticut statutes--that a state lien which is not perfected under state law due to failure to comply with all state law requirements,

^{18/} The holding of Miller v. Bank of America, N.T. & S.A., 166 F. 2d 415 (C.A. 9, 1948) was cited with approval in In Re Perry, 487 F. 2d 84 (C.A. 9, 1973), cert. denied, 415 U.S. 978 (1974), and followed in United States v. Morrison, 64-1 U.S.T.C. par. 9232 (S.D. Ohio, Oct. 22, 1963) (applying Ohio law) and S. Birch & Sons Construction Co. v. Capehart, 192 F. Supp. 330 (Alaska, 1961) (applying Alaska law). See also, Little Audrey's Transportation Co. v. Beverly Bank, 236 F. Supp. 352 (S.D. Ill., 1964) for the same proposition using Illinois law, and Bank of Lebanon v. J & W Lbr. Co., 252 Ore. 407, 448 P. 2d 367 (1968) for a similar result based on Oregon law. In Bank of Lebanon, the applicable state law stated that the lienholder (in this case, Oregon) "shall within six months * * * commence a suit to cause such lien to be foreclosed." (Ore. Rev. Stat. 656. 564(4)). Since this was not done prior to the time the Government filed its notice of tax lien, the Government's lien was granted priority.

and more specifically, the failure to serve a writ of execution,^{19/} has been also recognized in Dugan v. Missouri Neon & Plastic Advertising Co., 472 F. 2d 944 (C.A. 8, 1973).^{20/} Dugan presented the question of the steps a judgment creditor must take in order that his liens have priority over a filed federal tax lien in Missouri. The judgment creditors in Dugan had, after receiving judgment, served "summons of garnishment in aid of execution"

^{19/} Support for our position can also be gleaned from the case of United States v. Security Trust & Savings Bank, 340 U.S. 47, supra. Therein, the creditor procured an attachment of real estate prior to the time the federal tax lien was filed, but did not obtain judgment until after the lien was filed. The applicable California statute stated, inter alia, that the attachment created a lien on the real property for a period of three years. The Supreme Court first noted that California courts described the lien as a "potential right or a contingent lien," but then stated (p. 50):

The attachment lien gives the attachment creditor no right to proceed against the property unless he gets a judgment within three years * * *. Numerous contingencies might arise that would prevent the attachment lien from ever becoming perfected by a judgment awarded and recorded. Thus, the attachment lien is contingent or inchoate--merely a lis pendens notice that a right to perfect a lien exists.

Although the statute and lien in Security Trust are not identical to the statute and lien in the case at bar, the reasoning in both cases should be the same. In both cases, the creditors held some type of lien. In both cases, state law steps for perfection were needed. Therefore, we urge that the results in the two cases should be consistent. That is, since Provision did not successfully perfect its lien by execution prior to the time the tax lien was filed (just like the creditor in Security Trust failed to perfect its lien), Provision's lien cannot be accorded priority over the tax lien. See also, United Aircraft Corp. v. Edgerton & Sons, Inc., 208 F. Supp. 238 (Conn., 1962).

^{20/} Dugan actually involved two cases which were heard and submitted separately, but considered in the same opinion, since they involved a common legal question.

prior to the filing of the Government's liens. The Court, in its analysis, first stated (p. 949) that "in order to determine priority, it is necessary to ascertain whether or not a lien is created under state law, and, if so, the characteristics thereof." The Court thereafter found that the state liens in question satisfied the three tests of choateness, and, in addition, satisfied state law requirements for perfection. The Court stated (p. 952) "Further * * * [the creditor] by serving the garnishment summons, did all it could have done under state law to secure a lien on intangible property."

From a reading of the above-cited decisions, it is apparent that state requirements as to perfection of a state-created lien are of importance in a determination of whether a state lien can prime a federal tax lien. While the question of priority is a federal question, one of the elements which must be considered is the quality of perfection of the lien under the applicable state law. In Subpart C we will show, by both statutory and decisional law, that Provision's lien was unperfected under Connecticut law, much as the liens discussed above were unperfected under their respective state laws. The District Court did not consider the element of perfection under state law to be material, and, therefore, the Court's decision is incorrect.

- C. The District Court erred in failing to find that the judgment lien held by Provision was unperfected under Connecticut state law, due to Provision's failure to comply with all state law requirements necessary for perfection

In the Court below, Provision argued that it was a judgment lien creditor of Hall within the purview of Section 6323(a) prior to the time the Internal Revenue Service filed its notice of lien, and, therefore, Provision was entitled to the funds held by CRT which were due Hall. It is the Government's position that any lien held by Provision prior to the filing by the Internal Revenue Service was not perfected under Connecticut state law, and accordingly, should not be granted priority over the tax lien in issue. This position finds support in both the statutory and decisional law.

In the case at bar, Provision served a writ of attachment upon CRT on December 17, 1974. This writ was served pursuant to Conn. Gen. Stat. Ann. Section 52-329. On this date, Provision had an attachment lien upon the debt CRT owed to Hall. On January 31, 1975, Provision obtained a judgment against Hall. Thus, as of January 31, 1975, Provision was a judgment creditor of Hall. But prior to the time Provision successfully served ^{21/} a writ of execution, the Internal Revenue Service filed its

21/ Provision successfully served a writ of execution on CRT on March 25, 1977. This writ was served within 60 days of the judgment, but after the Internal Revenue Service filed its notice of tax lien on March 6, 1975.

notice of federal tax lien against Hall. It is the Government's position that as of March 6, 1975, Provision did not possess a fully perfected judgment lien.^{22/}

There are two Connecticut statutes which bear directly on the Government's position. The first is Conn. Gen. Stat. Ann. Section 52-328. This section states, inter alia, that no estate which has been attached shall be held to respond to the judgment obtained in the suit, unless the judgment creditor makes a demand, by writ of execution, within 60 days after final judgment. By its plain language Section 52-328 is a necessary step for perfection of a creditor's lien and this step was not accomplished prior to the filing of the notice of the federal tax lien. Furthermore, Section 52-381, Appendix, infra, reinforces this theory by stating that the garnishee must make payment to the plaintiff, after the plaintiff has made an execution. We believe that reading these two sections in conjunction demonstrate that Provision, although admittedly a lienholder, was not a fully perfected lienholder under state law,^{23/} and, as discussed in Subpart B, supra, is not entitled to priority over the tax lien.

^{22/} As noted earlier, the doctrine of relation back--that is, relating the writ of execution back to the date judgment was obtained, or the time the attachment took place--cannot aid a lienholder competing with a filed federal tax lien. The perfection of Provision's lien must be judged as of March 6, 1975. United States v. Security Trust & Savings Bank, 340 U.S., p.50, supra; cf. Investors Capital Corp. v. Schmidt, 29 Conn. Supp. 444, 448-449, 291 A. 2d 241 (Common Pleas, 1972).

^{23/} The District Court's reading of Section 52-328, although not entirely clear from its memorandum of decision, apparently viewed that section as placing a limit or duration on the judgment lien. Thus, the District Court apparently held that Provision had a

The courts of the State of Connecticut have interpreted Section 52-328 in exactly the same manner as we now urge. In Bradbury v. Wodjenski, 159 Conn. 366, 269 A. 2d 271 (1970), the Court was confronted with three creditors of one debtor, all claiming priority to funds held by the debtor's attorneys, as escrow agents. One creditor had not commenced any legal proceedings to collect his debt. The second creditor garnished the attorneys

23/ (continued):

fully vested, perfected lien, "subject to defeasance" if a writ of execution was not made within 60 days. This type of analysis and holding is clearly wrong. Had Provision failed to serve the writ of execution within the 60-day period provided for in Section 52-328, there is no question that its attachment lien would have "dissolved" and Provision would merely be an unsecured creditor. Bradbury v. Wodjenski, 159 Conn. 366, 269 A. 2d 271 (1970). Thus, as of March 6, 1975, Provision had not satisfied the requirement "that all steps must be taken that will insure that the lien will not be lost." United States v. Cutting & Trimming, Inc., 206 F. Supp., p. 954, supra. An unsecured creditor could certainly not meet even the three tests of choateness set forth in United States v. New Britain, 347 U.S., p. 81, supra. Therefore, it would appear that the District Court either utilized a "relation back" type of analysis or totally disregarded the consequences of the failure to comply with Section 52-328. Had Provision complied with Section 52-328 prior to the time the tax lien was filed, Provision would certainly be a judgment lien creditor within the purview of Section 6323(a) of the Internal Revenue Code. But absent such compliance, Provision's lien does not rise to the preferred status it was accorded by the District Court. If the lien is in any way unperfected, or if there is any act left to be done under state law to have a more perfect lien, then the lien as it stands is unperfected for state law purposes, and accordingly, unperfected under federal law standards. It is a "mere caveat of a more perfect lien to come." New York v. Maclay, 288 U.S., p. 294, supra. Cf. United States v. Scovil, 348 U.S. 218, 220, (1955). CRT was in no manner obliged to turn over the funds it owed to Hall absent the successful service of the writ of execution by Provision. Thus, as of March 6, 1975, Provision did not have a perfected claim to the funds held by CRT, and, absent the service of the writ of execution, could not have levied on any property of CRT. Therefore, Provision should not have been granted priority over the Government's lien. See Bank of Lebanon v. J. & W Lbr. Co., 252 Ore. 407, supra.

on April 15, 1966, and obtained a judgment on August 2, 1966, but never made an execution or demand in accordance with Section 52-328. The third creditor garnished the attorneys, obtained a judgment on July 18, 1967, and obtained and served a writ of execution on August 15, 1967. (On February 23, 1968, pursuant to Section 52-381, the third creditor commenced a scire facias proceeding against the garnishees.)

The trial court distributed the sums held in escrow on a pro-rata basis among the three creditors. The third creditor appealed, alleging that it had secured its judgment by executing upon it, thereby being prior in right to the entire fund. The Supreme Court of Connecticut agreed. First, the Court held that the unsecured creditor (the one who had undertaken no legal proceedings whatsoever) had to be subordinated to any creditor which had a secured interest in the funds in escrow. As to the two remaining creditors, the Court held that the successful service of the writ of execution was a necessary element for perfection. That is, both of these two creditors at one time had attachment liens, and both were judgment creditors, but one's lien was perfected, and the other's was not. The Court explicitly stated that execution was a necessary condition for perfection when it held (159 Conn., p. 370) that:

A judgment creditor, in order to perfect an attachment or garnishment made prior to judgment on his claim, must take out an execution and have it levied on the real or personal estate attached or have demand made on the garnishee within sixty days after final judgment. General Statutes § 52-328; * * *. In thus having an execution issued and demand made well within sixty days of final judgment, Batter [the third creditor] effectively perfected its attachment and secured its claim to the fund, thereby creating an interest in the fund superior to those of the other two defendants, the interests of which, as have been stated, remained unsecured.

From this holding by the Supreme Court of Connecticut, we submit that the lien held by Provision as of March 6, 1975, was not perfected, and by application of the principles discussed in Subpart B, *supra*, is not entitled to priority. United States v. Security Trust & Savings Bank, 340 U. S., p. 50, *supra*.

The similarity between the facts in Bradbury and the facts in the instant case compel reversal of the District Court's judgment. As of March 6, 1975, the Government stood in the same position as did the third creditor in Bradbury, after that third creditor had successfully served a writ of execution--that is, both the Government and the third creditor had perfected liens upon the property in question. Provision can be likened to the second creditor in Bradbury. They both had attached and they both had judgments, but neither had successfully served a writ of execution prior to the competing creditor's attaining full perfection. It is submitted that the result in the two cases should be the same. The creditor with the more perfect lien (in this case, the Government) must prevail.

The decision by the Court in Bradbury is well supported by Connecticut law. Thus, in City Nat. Bank of Conn. v. Traffic Eng. Assoc., Inc., 166 Conn. 195, 348 A. 2d 637 (1974), when faced with two competing creditors, both of whom had attached and both of whom had obtained judgments, the Court held that the crucial element necessary to decide priority was execution, for although "every attachment takes precedence over any subsequent attachment, each must be perfected by a timely issue and levy of execution upon the property attached." City Bank of Conn. v. Traffic Eng. Assoc., Inc., 166 Conn., p. 200, 348 A. 2d, p. 639, ^{25/}supra. In this same vein, see Markham v. Salovitz, 147 Conn. 189, 158 A. 2d 249 (1960) (failure by a plaintiff to comply with the "demand" dictates of Section 52-328 within 60 days prevents an action from arising); Century Indemnity Co. v. Kofsky, 115 Conn. 193, 161 A. 101 (1932) (a creditor has no claim to priority unless he first attaches, reduces the attachment to judgment and makes a demand); Quinlan v. City

^{25/} See also Coit v. Sistare, 85 Conn. 573, 578, 84 A. 119 (1912) in which the Court also stated that an attachment "is perfected by a timely issue and levy of execution upon the property attached." A necessary corollary to the holdings in Bradbury; City Nat. Bank of Conn.; and Coit is that, absent execution, any lien held by a creditor is unperfected. Thus, we submit that since the Supreme Court of Connecticut has itself declared that judgment lien holders (such as Provision in the instant case) do not hold perfected liens absent serving a timely writ of execution, the lien in the case at bar cannot be afforded priority over the filed federal tax lien. United States v. Security Trust & Savings Bank, 340 U.S., p. 50, supra.

National Bank, 105 Conn. 424, 135 A. 435 (1926) and Hayes v. Weisman, 97 Conn. 387, 116 A. 878 (1922) (the right to recover from a garnishee on scire facias is lost, unless demand is made by execution within 60 days after final judgment against the principal) and finally Gates v. Bushnell, 9 Conn. 530, 533-534 (1873) "A lien created by attachment, exists only for the purpose of enabling an attaching creditor to perfect an incipient right, by a legal levy of his execution, upon the property attached; but there can be no legal levy of the execution within the time necessary to preserve the lien, if within that time, the preliminaries to a valid levy, are not observed, among which a demand is indispensable; and if this is not made in cases where the law requires it, the property attached is exonerated from the operation of the lien."

We do not dispute the fact that Provision had some type of lien upon the debt owed Hall from CRT, but we do not believe that under Connecticut law, Provision held a fully perfected lien. We submit that by failing to comply with Section 52-328, Provision had at best a quasi-lien^{26/} and that this has been recognized by Connecticut courts. Since Provision had not complied with all state requirements for perfection prior to the filing of the federal tax lien, and in addition, since the quality of the lien it held on March 6, 1975, has been described as not perfected by the Supreme Court of Connecticut, it follows, utilizing the standards set forth in Subpart B, supra, that Provision's lien does not prime the tax lien.

^{26/} Cf. Meyers v. C.I.T. Corp., 132 Conn. 284, 287, 43 A. 2d 742 (1945).

CONCLUSION

For the reasons stated above, the judgment of the District Court should be reversed, and the District Court should be directed to enter judgment for the United States.

Respectfully submitted,

M. CARR FERGUSON,
Assistant Attorney General,

GILBERT E. ANDREWS,
CROMBIE J. D. GARRETT,
AARON ROSENFELD,
Attorneys,
Tax Division,
Department of Justice,
Washington, D. C. 20530.

Of Counsel:

RICHARD BLUMENTHAL,
United States Attorney.

NOVEMBER, 1977.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing four copies thereof on this _____ day of November, 1977, in an envelope, with postage prepaid, properly addressed to him as follows:

John J. Graubard, Esquire
Wofsey, Rosen, Kweskin &
Kuriansky
777 Summer Street
Stamford, Connecticut 06901

GILBERT E. ANDREWS,
Attorney.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

SEC. 6322 [as amended by Sec. 113(a), Federal Tax Lien Act of 1966, P. L. 89-719, 80 Stat. 1125]. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

SEC. 6323 [as amended by 101(a), Federal Tax Lien Act, supra]. VALIDITY AND PRIORITY AGAINST CERTAIN PERSONS.

(a) Purchases [purchasers], Holders of Security Interests, Mechanic's Lienors, and Judgment Lien Creditors.-- The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary or his delegate.

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Treasury Regulations on Procedure and Administration (1954 Code)
(26 C.F.R.):

§ 301.6323(h)-1 Definitions.

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(g) Judgment lien creditor. The term "judgment lien creditor" means a person who has obtained a valid judgment, in a court of record and of competent jurisdiction, for the recovery of specifically designated property or for

a certain sum of money. In the case of a judgment for the recovery of a certain sum of money, a judgment lien creditor is a person who has perfected a lien under the judgment on the property involved. A judgment lien is not perfected until the identity of the lienor, the property subject to the lien, and the amount of lien are established. Accordingly, a judgment lien does not include an attachment or garnishment lien until the lien has ripened into judgment, even though under local law the lien of the judgment relates back to an earlier date. If recording or docketing is necessary under local law before a judgment becomes effective against third parties acquiring liens on real property, a judgment lien under such local law is not perfected with respect to real property until the time of such recordation or docketing. If under local law levy or seizure is necessary before a judgment lien becomes effective against third parties acquiring liens on personal property, then a judgment lien under such local law is not perfected until levy or seizure of the personal property involved. The term "judgment" does not include the determination of a quasi-judicial body or of an individual acting in a quasi-judicial capacity such as the action of State taxing authorities.

Conn. Gen. Stat. Ann.:

§ 52-328. Duration of attachment liens after judgment

No estate which has been attached shall be held to respond to the judgment obtained in the suit, either against the debtor or any other creditor, unless the judgment creditor takes out an execution and has it levied on the personal estate attached, or demand made on the garnishee in the cases of foreign attachment, within sixty days after final judgment, or levied on the real estate attached, and the same appraised, and the execution and proceedings thereon recorded, within four months after such judgment; or, if such goods or estate is encumbered by any prior attachment, unless the execution is so levied within the respective times aforesaid after such encumbrance has been removed; except only in case of a foreign attachment against an executor, administrator or trustee in insolvency, upon whom demand shall be made within the times limited in sections 52-389, 52-390 and 52-391. In determining said periods within which the attaching creditor is so required to take out and levy execution, any time during which the issue or levy of an execution may be prevented or stayed by the pendency of a writ of error, or by an injunction or other legal stay of execution, shall be excluded from the computation.

§ 52-381. Liability of garnishee; scire facias

If judgment is rendered in favor of the plaintiff in any action by foreign attachment, all the effects in the hands of the garnishee at the time of the attachment, or debts then due from him to the defendant, and any debt, legacy or distributive share, due or to become due the defendant from any garnishee as an executor, administrator or trustee, shall be liable for the payment of such judgment. The plaintiff, on praying out an execution, may direct the officer serving the same to make demand of such garnishee for the effects of the defendant in his hands, and for the payment of any debt due the defendant, and such garnishee shall pay such debt or produce such effects, to be taken and applied on such execution. If he has in any manner disposed of the effects of the principal in his hands when the copy of the writ was left with him, or does not expose and subject them to be taken on the execution, or does not pay to the officer when demanded the debt due the defendant at the time the copy of the writ was left with him, such garnishee shall be liable to satisfy such judgment out of his own estate, as his proper debt, if the effects or debt is of sufficient value or amount; if not, then to the value of such effects or to the amount of such debt. A scire facias may be taken out from the clerk of the court where the judgment was rendered, to be served upon such garnishee, requiring him to appear before such court and show cause, if any, to the contrary; and the plaintiff may require the defendant, and the defendant shall have the right, to disclose on oath whether he has any of the effects of the debtor in his hands, or is indebted to him; and the parties may introduce any other proper testimony respecting such facts. If it is found that the defendant has the effects of such debtor in his hands or is indebted to him, or if he makes default of appearance or refuses to disclose on oath, judgment shall be rendered against him, as for his own debt, to be paid out of his own estate with costs; but, if it appears on the trial that the effects are of less value or the debt of less amount than the judgment recovered against the debtor, judgment shall be rendered to the value of the goods or to the amount of the debt; and if it appears that the defendant has no effects of such debtor in his hands or is not indebted to him, he shall recover costs.

CASE NO. 77-6142

UNITED STATES COURT OF APPEALS FOR THE Second CIRCUIT

Term, 19...

THE HARTFORD PROVISION COMPANY

vs.

UNITED STATES OF AMERICA

The Clerk will enter our appearances as Counsel for the Appellant

(Name) *Crombie J. D. Garrett*
CROMBIE J. D. GARRETT,
(Name) *Aaron Rosenfeld*
AARON ROSENFELD,
(Name) Attorneys,
Tax Division,
(Name) Department of Justice,
Washington, D.C. 20530.
(Name) _____
(Name) _____